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Hand Delivered

Paul D'Ari, Chief
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Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
2100 M Street, N.W., Room 700
Washington, D.C. 20554

Re: Reply Comments of Western Wireless Corporation
WT Docket No. 98-205

Dear Mr. D'Ari:

Transmitted herewith is a formatted 3.5 mm diskette containing the Reply Comments of Western Wireless Corporation in the above-referenced proceeding. The original paper copies of the Comments are being filed with the Commission concurrently herewith.

Please address any questions regarding this matter to the undersigned counsel for Western Wireless Corporation.

Very truly yours,

Daniel E. Smith

cc (w/encl): International Transcription Service, Inc

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of 1998 Biennial Regulatory Review-- Spectrum Aggregation Limits for Wireless Telecommunications Carriers Cellular Telecommunications Industry Association's Petition for Forbearance From the 45 MHz CMRS Spectrum Cap	WT Docket No. 98-205

To: The Commission

REPLY COMMENTS
OF
WESTERN WIRELESS CORPORATION

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February 10, 1999

TABLE OF CONTENTS

SUMMARY

The record before the Commission in this proceeding compels eliminating the 45 MHz cap on cellular, PCS and SMR spectrum (or, alternatively, forbearing from its enforcement). The rapid growth of two-way mobile voice competition throughout the United States has rendered the cap superfluous, and maintaining the cap will have harmful, even anti-competitive ramifications.

In evaluating the comments and, generally, the record before it, the Commission should pay careful attention to the burden of proof under Section 11. That provision requires that a rule be eliminated (or modified) unless it is "necessary" to the public interest. While several proponents of the spectrum cap speculate as to its continued utility, no credible evidence has been presented to show that the cap is necessary. Even where commenters point to worthy policy objectives, they fail to show that the cap is necessary or essential to achieving these objectives.

Indeed, the policy objectives identified in this proceeding will not be advanced, and in many cases will be retarded, by retaining the cap. Clear and convincing evidence has been presented that, although PCS is still in its infancy vis-a-vis cellular, PCS carriers and Nextel have already had a significant impact in most markets in the United States. Three or more competitors are present in a majority of markets, resulting in improved service quality, increased service options and falling prices. Nor are there any reasons to doubt the continued growth of competition in two-way mobile voice, regardless of the cap's existence.

The cap should not be retained to categorically block transactions due to normal market consolidation. Many of these transactions serve the marketplace, by allowing carriers to take advantage of economies of scale and scope, increase coverage and introduce new services. In any case, eliminating the cap does not equate to sanctioning any and all mergers; the Commission

continues to be obliged to scrutinize mergers and acquisitions under Section 310 of the Act, and anti-competitive behavior will continue to be regulated through the Commission's enforcement procedures.

Moreover, the spectrum cap is overly restrictive and affirmatively harms the wireless industry, to the detriment of competition in broader telecommunications markets and the public. It sets limits on the ability of existing and emerging carriers to employ economies of scope, enter into creative joint venture arrangements and utilize available investor funding sources, thereby deterring expansion of service in rural areas. It imposes limitations on one segment of the wireless industry-- two-way voice-- even as telecommunications services are entering a point of accelerated convergence. And it limits the ability of carriers to offer new, enhanced services in competition with other sectors of the telecommunications industry, including local exchange services.

In sum, meaningful economic competition in the mobile two-way voice market has arrived. The spectrum cap has served its purpose, but retaining it beyond its usefulness is unnecessary and contrary to the public interest.

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of 1998 Biennial Regulatory Review-- Spectrum Aggregation Limits for Wireless Telecommunications Carriers Cellular Telecommunications Industry Association's Petition for Forbearance From the 45 MHz CMRS Spectrum Cap	WT Docket No. 98-205

To: The Commission

REPLY COMMENTS OF WESTERN WIRELESS CORPORATION

Western Wireless Corporation ("Western"), by its attorneys and pursuant to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding (released December 10, 1998), hereby replies to comments filed with respect to the NPRM. In support hereof, the following is respectfully shown:

I. INTRODUCTION

In its initial Comments, Western demonstrated that the 45 MHz spectrum cap has been rendered superfluous by the rapid growth of two-way mobile voice competition throughout the United States, and that maintaining the cap will have harmful, even anti-competitive ramifications. In particular, Western documented that in two markets where it currently holds more than 45 MHz

of spectrum,[1/] competition is flourishing and Western's above-cap holdings in excess of the cap have had only positive effects. Western also showed that the cap will disserve the Commission's worthy goals of fostering continued competition in CMRS and bringing the benefits of mobile service to rural and other underserved areas.

On balance, the comments in response to the NPRM strongly support Western's positions and the principles expressed by the Commission in the NPRM. In this Reply, Western focuses on three essential points that emerge from review of the record:

> *First*, Section 11 of the Communications Act of 1934, as amended (the "Act"), requires that a rule be eliminated (or modified) unless it is "necessary" to the public interest; the spectrum cap clearly does not meet this exacting standard;
>
> *Second*, the cap fails to advance any of the significant objectives identified by the Commission and commenting parties, *i.e.*, ensuring competitive markets, preventing dominance by cellular incumbents, curbing excessive consolidation, or stimulating service in rural and/or undeveloped areas; and
>
> *Third*, the cap is overly restrictive and affirmatively harms the wireless industry, to the detriment of competition in broader telecommunications markets and the public.

The record before the Commission compels eliminating the cap or, minimally, forbearing from its enforcement as proposed by the Cellular Telecommunications Industry Association ("CTIA"). The Commission may also forbear from enforcing the cellular cross-ownership rule, however, it should accord heightened scrutiny to proposed mergers and acquisitions involving both cellular systems in a market because of the anti-competitive effects which may result from such

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[1/] Western is prosecuting requests for waiver of the spectrum cap in these two markets, and has been granted extensions of time to comply with the cap pending disposition of the waiver proceedings. *See* Request of Western PCS II Corporation for Waiver of Section 20.6 of the Commission's Rules, File No. CWD 96-14 (filed July 11, 1997, amended September 8, 1998) ("Denver Waiver Request"); Request of Western PCS I License Corporation for Waiver of Section 20.6 of the Commission's Rules, File No. 98-89) (filed January 29, 1998) ("OK City Waiver Request").

incumbent combinations.[2/]

II. BECAUSE IT FAILS THE "NECESSARY" STANDARD IMPOSED BY SECTION 11, THE SPECTRUM CAP MUST BE ELIMINATED

As discussed below, the record in this proceeding is clear: the spectrum cap is superfluous to the Commission's policy objective of protecting and promoting competition in the wireless mobile voice marketplace. Moreover, the initial comments demonstrate that the cap impedes system construction and introduction of advanced services whose availability increase competition within the telecommunications industry as a whole. Even if the Commission determined that the spectrum cap, though dispensable, has no adverse public interest consequences and may have some residual utility, Section 11's plain meaning requires its elimination.

Under Section 11 of the Act the Commission must repeal (or modify) any regulation that "is no longer *necessary* in the public interest as the result of *meaningful economic competition.*"[3/] As aptly stated by AirTouch, for the spectrum cap to be retained, Section 11 requires an affirmative finding that the cap is necessary in light of emerging competition.[4/] Indeed, Commissioners Powell and Furchtgott-Roth have both acknowledged that the burden of proof under Section 11 lies with the Commission and with parties seeking to preserve existing rules. In his Statement on issuance of the

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2/ In its Comments (at 2), Western proposed allowing interested parties (or the Commission) to show that acquisition of a particular cellular cross-ownership interest will confer excessive market power on the prospective acquiring entity, while allowing the prospective acquirer an opportunity to rebut that showing.

3/ 47 U.S.C. §161 (emphasis added).

4/ Comments of AirTouch Communications, Inc. ("AirTouch") at 9-10. *See also,* Comments of BellSouth Corporation ("BellSouth"), at 3-5; Comments of Bell Atlantic Mobile, Inc. ("Bell Atlantic"), at 4-8.

NPRM, Commissioner Powell stated that:

> the burden should be on us, the FCC, to re-assess and re-validate the rule . . . . We must be prepared . . . to make a compelling and convincing case that the rule must be kept. If we cannot, or if the evidence in support of the rule is lacking, we must modify or eliminate it and rely on competitive market forces or other mechanisms . . . . We cannot continue to sit back and struggle over getting rid of another ownership restriction because its opponents have failed to show why the rule is no longer "in the public interest."[5/]

Likewise, Commissioner Furchtgott-Roth reads Section 11 to require that "a rule that is arguably in the public interest, but not *necessary* in the public interest must be eliminated or modified."[6/]

In Section III, *infra*, Western shows that, based on the record provided in this proceeding and other publicly available records, *meaningful economic competition* in CMRS-- and mobile two-way voice in particular-- exists by any reasonable interpretation of these words, and that the spectrum cap is necessary neither to stimulate, preserve nor protect this market. Although several commenting parties speculate that maintaining the cap will, *inter alia*, make the mobile voice market more competitive,[7/] curtail industry consolidation,[8/] and foster service availability in rural areas,[9/] no

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5/ *In the Matter of 1998 Biennial Regulatory Review-- Spectrum Aggregation Limits for Wireless Telecommunications Carriers,* WT Docket No. 98-205 (released December 10, 1998), Separate Statement of Commissioner Michael Powell, at 1.

6/ Report on Implementation of Section 11 by the Federal Communications Commission, Commissioner Furchtgott-Roth, released December 21, 1998, at 2.

7/ Comments of the Personal Communications Industry Association ("PCIA"); Comments of Northcoast Communications, L.L.C. ("Northcoast"); Comments of Wireless One Technologies, Inc. ("Wireless One"); Comments of D&E Communications, Inc. ("D&E"); Comments of MCI Worldcom, Inc. ("MCI").

8/ Comments of Sprint Spectrum L.P. d/b/a/ Sprint PCS ("Sprint"); Comments of MCI; Comments of Telecommunications Resellers Association ("TRA").

9/ *See, e.g.,* Comments of PCIA, Northcoast and Wireless One.

commenter provides evidence that the cap is necessary or essential to achieving these objectives. Rather, the claims made by the cap's advocates are mere conjecture; there is no basis for concluding that market forces or other regulations are inadequate to advance these objectives.

Initial comments by TRA illustrate the spectrum cap's proponents' inability to cope with the evidentiary burden imposed by Section 11. In the only section of these comments that attempt to demonstrate that the cap remains "necessary in the public interest," TRA asserts that the Commission must maximize, per market, the number of carriers that provide one-stop shopping for wireless, local, long distance and other services.[10/] TRA nowhere demonstrates why the cap is essential to this objective and conveniently ignores facts that underscore precisely the contrary point-- that there is scant connection between the cap and a market's intrinsic competitiveness.

First, cellular and PCS carriers are legally entitled to partition their licenses geographically or disaggregate spectrum, or both. With or without a spectrum cap, a single 30 MHz PCS carrier could, for example, create two additional 10 MHz rivals in all or some portion of the MTA where it was the initial licensee thus advancing TRA's objective. Second, even if a single carrier (in a no cap environment) attempted to monopolize a market by hoarding CMRS spectrum and then raising prices, advances in spectrally efficient wireless technologies imply that:

> one 10 MHz block of spectrum is sufficient to provide a wireless carrier with the ability to satisfy the current demand for wireless voice services. Thus, so long as there remained at least one 10 MHz carrier in the same region willing to match the old price of the larger firm, that smaller firm would be poised to absorb most of the larger firm's traffic due to the technological capabilities of spectrum

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10/ Comments of TRA, at 11-12.

management.[11/]

In sum, TRA's claim that CMRS spectrum constitutes an "inherent . . . limitation" on the number of competing providers in a market is exaggerated at best and, under all reasonably foreseeable scenarios, inaccurate.[12/] Assuming *arguendo* that the cap's elimination precipitated spectrum accumulating mergers followed by predatory pricing (notwithstanding oversight by two regulatory authorities specifically designed to present such developments), the Commission retains the power to auction additional spectrum in this situation.[13/]

Sprint grounds its defense of the cap on three assertions: (i) that the cap is needed to ensure that developing CMRS competition is neither "retarded" nor "dislodged;" (ii) market share data shows Herfindahl-Hirschman Index ("HHI") levels "well above the 1900 level that the Commission has deemed acceptable;" and (iii) there is no evidence suggesting that the cap is inhibiting any carrier from serving any customer or providing any service.[14/] Each of these contentions is easily refuted.

Neither Sprint PCS nor any other spectrum cap advocate has demonstrated that, but for the spectrum cap, competition in the CMRS marketplace will disappear or diminish. Indeed, Western's experience as an operator convincingly undermines the view that the cap is the lone guarantor of robust wireless competition. In the Denver and Oklahoma City MTAs, Western offers PCS at rates

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[11/] Declaration of J. Gregory Sidak and David J. Teece at 17-18, attached to Comments of GTE Service Corporation ("GTE").

[12/] Moreover, in urging the cap's retention on the ground that this rule maximizes the number of providers (TRA Comments, at 3, 11-12), TRA undermines its claim (at 6) that "the simple number of wireless providers" is an "incorrect assessment" of market competition.

[13/] Declaration of Robert W. Crandall and Robert H. Gertner, at 16 (¶47), attached to Comments of Bell Atlantic.

[14/] Comments of Sprint PCS, at 7, 11 and 14.

up to twenty per cent below its competitors even though its aggregate spectrum in portions of these markets exceeds the applicable cap, thus necessitating waiver requests (that Sprint PCS is opposing). Were Sprint's theory accurate, Western's PCS prices in these two markets would equal or exceed prices charged by its rivals while market-wide prices would exceed those in cap-compliant markets. Neither relationship is true.[15/]

Sprint's claim that actual market share data evidence extremely high CMRS concentration levels is based on data that are irredeemably flawed and unreliable. According to Sprint's witness, the data are collected from a semi-annual mail survey asking wireless customers to select the primary wireless carrier in their households from among 15 carriers listed on the survey form.[16/] Due to space limitations some carriers are omitted from the form. Sprint's witness candidly acknowledged that:

> This form of self-reporting is likely to under count the customers whose carriers are not among the 15 listed carriers. In the data that I examined, the sample number of households that identified a primary carrier often fell short of the sample number of households that reported purchasing mobile wireless telephone service by more than 25 per cent. Because these wireless households did not indicate a primary carrier, they could not be included in the market share

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15/ If anti-competitive pricing appeared in these or other markets, the Commission could eradicate it simply by auctioning additional spectrum without inflicting the costs associated with the spectrum cap in all the other markets where competition is adequate. That numerous other potential wireless competitors-- *e.g.*, 220 MHz SMR, dispatch, one-way and two-way data, fixed services including wireless local loop, mobile satellite service (which enjoys an expansive bandwidth allocation), Local Multipoint Distribution Service ("LMDS"), millimeter wave radio services in the 18 and 39 GHZ bands, perhaps even interactive video and data service-- are poised to take advantage of the opportunities monopoly pricing presents will, most likely, make such market-specific auctions unnecessary.

16/ "CMRS HHIs From Customer Share Data," Statement of John B. Hayes, Attachment A to Comments of Sprint, at 3.

calculations.[17]

Stated simply, Sprint's conclusions about CMRS competition are based on household surveys from January and July 1998 that under report certain carriers' combined market shares by "*more* than 25 per cent."[18] The precise extent of this under reporting-- whether, in fact, it is 30, 40, even 50 per cent-- is never disclosed by Sprint. In any event, the level is substantial, reflecting the inexplicable omission from the survey form, for example, a cellular incumbent in the Philadelphia MSA.[19] Considered objectively, Sprint's survey data is highly defective; any conclusions derived therefrom concerning CMRS concentration is devoid of credibility and should not be used as a basis for resolving the issues before the Commission in this proceeding.[20]

Sprint also urges that the cap be retained because Sprint itself "is not aware of any evidence even suggesting that the cap is inhibiting any carrier from serving any customer or providing any service." Disregarding the irony of Sprint opining on the product and service constraints the spectrum cap imposes on its *competitors*, this casual observation stands the statutory test on its

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[17] *Id.* at 3-4.

[18] *Id.* at 4 (emphasis added). Notably, as described, the survey is limited to households. Sprint's witness gives no indication that the data is adjusted in any way to account for business subscribers.

[19] *Id.*, note 7.

[20] These immense defects notwithstanding, Sprint's witness claims that the survey data provide a "reasonably accurate" measure of carriers' market shares because Sprint conducted several telephone surveys in mid-1998 confirming the data's general accuracy and suggesting that the data's biases are small. *Id.* No information is provided concerning the methodology and extent of these secondary surveys. Accordingly, the claim that Sprint's flawed survey results constitute a "reasonably accurate" indicator of market shares must be regarded as self-serving attempt to salvage a data collection process that cannot withstand scrutiny.

head.[21] Section 11 provides no safe harbor for innocuous rules and regulations, as Sprint seems to imply. Rather, the statute requires the Commission to repeal those rules that competition has rendered superfluous, dispensable and unnecessary. The spectrum cap, indisputably, falls in this category.

III. THE SPECTRUM CAP IS UNNECESSARY TO MEET THE OBJECTIVES SET FORTH IN THIS PROCEEDING

The purpose of the spectrum cap, as originally adopted, was to "provide an expedited means of ensuring that multiple service providers would be able to obtain spectrum in each market and thus facilitate development of competitive markets for wireless services."[22] The cap was viewed as a "'minimally intrusive means' for ensuring that the mobile communications marketplace remained competitive and preserved incentives for efficiency and innovation."[23] In the NPRM, and in the Commission's Third Competition Report,[24] the Commission acknowledged that the level of competition in the mobile two-way market has dramatically increased since the cap was installed. Nevertheless, various commenting parties suggested several rationales for retaining the cap: ensuring competition; combating cellular incumbency advantage; guarding against excessive consolidation; and promoting wireless services in rural areas. None of these rationales can be reconciled with

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[21] In its Comments (at 4), MCI suggests that any change to the spectrum cap should "produce a result even more pro-competitive" than the *status quo* under the cap. To accept this advice, the Commission must be willing to disregard its express statutory duty under Section 11.

[22] NPRM at ¶2.

[23] *Id.* at ¶13, *citing Implementation of Sections 3(n) and 332 of the Communications Act,* GN Docket No. 93-252, Third Report and Order, 9 FCC Rcd 7988, ¶16 (1994).

[24] *Annual Report and Analysis of Competitive Market Conditions with respect to Commercial Mobile Services,* ("Third Report"), 12 CR 623 (1998) ("*Third Competition Report*").

current marketplace realities.

A. The Mobile Two-Way Voice Market Is Robust and Competitive

The comments and the Commission's own public documents provide ample evidence that meaningful economic competition exists, and is rapidly increasing, in CMRS generally, and the two-way mobile voice market in particular.[25/] Western and numerous commenters cite the Commission's assessment of CMRS in its Third Competition Report, *i.e.*, in June 1998 there were "at least three mobile telephone providers in each of the 50 largest Basic Trading Areas ("BTAs") and 97 of the 100 largest BTAs."[26/] In the NPRM (at ¶34), the Commission recognizes the existence of "price and service rivalry in many markets," as a result of which "prices are falling markedly, service quality is improving, and new services are becoming available." In another proceeding, the Commission declared that "substantial progress has been made towards a truly competitive mobile telephone marketplace, resulting in lower prices and more attractive service offerings for consumers," and labeled the CMRS market as "more competitive than most telecommunications markets."[27/] AirTouch notes that the market is characterized by rapid introduction of new services, including data services, and innovative pricing plans, and that consumers are responding by routinely switching

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25/ In addition, as discussed in Section IV, *infra*, the spectrum cap's application to two-way voice is overly restrictive and soon to be anachronistic.

26/ 12 CR at 625. This trend has continued since the *Third CMRS Competition Report* was issued. NPRM at ¶¶35-45.

27/ *Biennial Regulatory Review - Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations*, Memorandum Opinion and Order in WT Docket No. 98-100 (released July 2, 1998), at ¶8.

wireless carriers to obtain more favorable packages.[28/] GTE notes that competition has spurred the development and marketing of regional and nationwide footprints.[29/] Likewise, in its Comments (at 7-8), Western documented the introduction of multiple PCS service providers in the Denver and Oklahoma City MTAs and a corresponding dramatic reduction in prices.

While many PCS licensees have yet to initiate service, and competition is still in its early stages in certain markets, the record shows that the movement towards more competitive markets will continue and accelerate. In the Third Competition Report, for example, the Commission concluded that "[w]hile this transformation is still underway, the mobile telephone market is well on its way to becoming dynamic and competitive."[30/] Recent independent market analysis projects accelerated growth of the market, both in terms of service offerings and newcomers' market shares.[31/] Even commenters advocating retention of the cap recognize that markets will become increasingly competitive as additional PCS carriers launch service.[32/]

Western agrees with the Commission and other commenters that the spectrum cap has played a role in facilitating the development of competitive markets.[33/] As Bell Atlantic and CTIA note, however, the objectives of the cap were largely tied to the initial PCS licensing stages and are no

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28/ Comments of AirTouch, at 7-8.

29/ Comments of GTE, at 10.

30/ 12 CR at 633.

31/ McGraw-Hill Companies and U.S. Department of Commerce/International Trade Administration, *U.S. Industry & Trade Outlook '99* (New York: McGraw-Hill Companies, Inc., 1999) ("*U.S. Industry & Trade Outlook*"), at 30-13.

32/ Comments of PCIA, at 9; Comments of Telephone and Data Systems, Inc. ("TDS"), at 3-4; Comments of D&E, at 8-9.

33/ *See, e.g.,* NPRM at ¶35; Comments of Bell Atlantic, at 14-16; Comments of MCI, at 2.

longer applicable to the competitive CMRS market.[34/] In particular, the cap inappropriately utilizes spectrum as a proxy for actual an/or potential market power. Spectrum provides access to the marketplace; once this access has been provided through fair and open procedures (*i.e.*, the Commission's PCS and SMR spectrum auctions), the Commission should discard threshold entry rules and allow marketplace forces to direct competition.[35/] To the extent the Commission must continue to monitor CMRS competition, its focus should be on issues such as build-out requirements, service availability, equipment, and pricing, rather than ownership restrictions.

Moreover, none of the comments in favor of retaining the cap establish any causal link between the cap and continued stimulation of competition. Rather, as shown by several commenters, competition has been spurred by market forces-- including new entrants, technological development (*e.g.,* digitalization and improved hand-held units), and innovative pricing-- and by other pro-competitive efforts by the Commission, most notably its auctioning of additional spectrum for mobile services, establishing minimum coverage benchmarks, and liberalizing partitioning and disaggregation rules.[36/]

Ultimately, a competitive market's key indicia are higher quality service, increased service options, lower prices, and increasing output (or usage by consumers). Even using 1997 data

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[34/] Comments of Bell Atlantic, at 14-16; Comments of CTIA, at 15; Comments of AT&T, at 2-3.

[35/] CTIA correctly notes (at 15) that the PCS licensing process is at virtually the same point as the cellular process when the Commission lifted the wireline/wireless ownership eligibility restrictions. Once the majority of available spectrum has been assigned, the Commission's goal of facilitating competitive markets has been realized.

[36/] Comments of AirTouch, at 10-11; Comments of CTIA, at 15-16.

provided in the Third Competition Report, the answer to this question is a resounding yes.[37] The spectrum cap is simply no longer needed.

B. Cellular Dominance Is Diminishing Due To Market Forces

PCIA argues that even if markets may appear to be competitive, the more than ten year head start enjoyed by many cellular carriers may restrict competition, destabilize the market and prevent multiple new entrants from becoming long-term players.[38] This alleged "nascent" status of PCS-cellular competition does not warrant retaining the spectrum cap. First, PCIA's depiction of the mobile voice marketplace cannot be credited, as it stands in stark contrast to its recent touting of CMRS as "clearly *the* most competitive telecommunications market" in arguing that the Commission should forbear from enforcing the CMRS resale rules.[39]

Second, cellular carriers' incumbency advantages are projected to decline significantly as more PCS services are introduced; this will occur irrespective of a spectrum cap. Sprint cites Commission projections to argue that cellular will continue to hold a significant edge over PCS for several years.[40] More recent projections, however, show PCS claiming a far greater market share.

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[37] 12 CR at 624-626 (at the end of 1997, the mobile two-way voice market had over 55 million subscribers, nearly 12 percent of all U.S. telecommunications revenues).

[38] These concerns are shared by, *inter alia,* Sprint, MCI, Wireless One, TDS and D&E.

[39] PCIA's Petition for Reconsideration of the Commission's *Biennial Regulatory Review - Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations*, Memorandum Opinion and Order in WT Docket No. 98-100 (filed September 10, 1998), at 8, note 32 (emphasis in the original). Indeed, PCIA documented the pricing strategies and figures of several of the largest cellular and PCS carriers to demonstrate a variety of low and moderate-priced service options, thereby illustrating a high level of competition and resulting public benefits. *Id.* at 8-9.

[40] Comments of Sprint, at 9, *citing Third Competition Report*, at Tables 5A-5E. Similarly, PCIA provides current estimates of market share for cellular, PCS and SMR (Comments of PCIA at Exhibit A), but offers no projections regarding increased market share for new entrants.

A recently released Commerce Department study acknowledges more conservative projections such as Sprint's, but concludes that "[o]n average, however, it is projected that PCS subscribers will account for 40 to 45 percent of subscribers and about half of total service revenues by 2002."[41/]

Third, the claim that eradicating the cap will give cellular carriers free reign to prolong the dominance afforded by their headstart by acquiring additional spectrum and exerting market power has already been shown to be untenable. Provided there is a single independent carrier with a 10 MHz allocation, any cellular incumbent attempting to monopolize a market by acquiring large chunks of CMRS spectrum will remain vulnerable to having most of its traffic absorbed by the independent. Even if this were untrue, multiple potential wireless competitors-- *e.g.*, 220 MHz SMR, mobile satellite service, LMDS, *etc*-- are poised to exploit the opportunity that any such market monopolization strategy will present.

Finally, TDS (at 3-4) and PCIA (at 10-11) are wrong in claiming that eliminating cap will constitute a fundamental change to the CMRS competitive environment because auction participants relied on existence of the cap. The cap was designed to facilitate entry; it was never intended to guarantee a fixed number of competitors in any given market.

C. The Spectrum Cap Is Not Needed To Prevent Undue Consolidation

Several commenters also fear that eliminating the spectrum cap will result in excessive consolidation of cellular and/or PCS systems, giving merged firms sufficient market power to limit competition.[42/] Most commenters raise this concern with respect to smaller markets, although Sprint

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41/ *U.S. Industry & Trade Outlook*, at 30-13.

42/ *See* Comments of Sprint, at 7-8; Comments of MCI, at 4; Comments of Northcoast, at 2-3.

expresses concern that mergers will eliminate competition even in major markets. Although the spectrum cap may have served to limit the effects of mergers in the past, use of a bright-line, inflexible rule such as the cap is neither necessary nor prudent.

Several of the commenters misread the Commission's discussion of market consolidation in its Third Competition Report. Consolidation is not, in and of itself, harmful to competition or detrimental to the public, nor is the consolidation occurring in CMRS markets "competition eroding" as asserted by Northcoast.[43/] Rather, as the Commission explained in the Third Competition Report, increased consolidation among broadband carriers is "part of the process of efficiently re-allocating resources and developing efficient and competitive markets."[44/] The Commission also noted that "[c]onsolidation has not significantly reduced the number of providers of a given service within a given geographic market . . . [m]ost of the activity in the CMRS license secondary market over the past year fits into three categories: footprint expansion, footprint refinement, and rural investment."[45/] Consolidation of licenses and existing systems may enable carriers to take advantage of economies of scale and/or scope, to expand wide-area footprints and, most important, to allow more effective competition with wireline carriers. Thus, consolidation may actually increase competition, especially in rural areas where the cost of new construction may otherwise foreclose new entry.[46/]

43/ Comments of Northcoast, at 3, *citing* NPRM, at ¶37.

44/ *Third Competition Report, at* 628.

45/ *Id.* at 639.

46/ Comments of AT&T, at 7 and 12; Comments of CTIA, at 12; Comments of The Rural Telecommunications Group ("RTG"), at 8-9.

Notwithstanding the foregoing, Western agrees that excessive consolidation may have anti-competitive ramifications where mergers involve overlapping licenses in major markets, particularly where the subject licenses represent mature systems with large significant market shares.[47/] Even in such instances, however, Western agrees with CTIA that the spectrum cap is an inappropriate criterion for distinguishing between acceptable and unacceptable transactions, and that the Commission has numerous other tools at its disposal. Most notably, and contrary to the suggestions of several commenters, eliminating the spectrum cap will not alter the Commission's obligation to review and approve transfers under Section 310 of the Act, nor will it preclude the Commission from considering the very competitive factors for which the cap is a clumsy proxy.[48/] The Commission also has at its disposal a host of regulations, including its complaint and enforcement procedures under Section 308 of the Act, that guard against anti-competitive practices.[49/]

Further, the spectrum cap appears designed to guard against behavior that, simply put, makes no economic sense in the CMRS marketplace. Economic analyses provided by Bell Atlantic and AT&T demonstrate that spectrum aggregation makes commercial sense only insofar as the acquired spectrum is needed and can be utilized to obtain a fair return. Alternative spectrum is available to provide competing services (*i.e.*, mobile satellite and LMDS services), and competing CMRS

[47/] For this reason, Western supports forbearance from enforcing the cellular cross-ownership rule but, as set forth in its Comments (at 4 and 16), believes that the Commission should enable parties to demonstrate that a proposed transaction will create excessive market power.

[48/] Comments of CTIA, at 14. Likewise, eliminating the spectrum cap will in no way alter antitrust review of proposed mergers and acquisitions by the Federal Trade Commission, Department of Justice or other government entities.

[49/] *See* Comments of Western, at 12.

carriers can increase capacity to respond to market foreclosure efforts or price increases.[50/] Moreover, Sprint, a strong advocate of retaining the cap, notes that few carriers presently hold 40-45 MHz of spectrum in one market.[51/] If carriers were actively seeking to acquire and, presumably, hoard spectrum, more carriers would hold the maximum allowable spectrum in one or more markets. It follows that lifting the cap is unlikely to spur additional mergers.

D. Retaining the Spectrum Cap Will Retard Expansion of Service to Rural Areas

Finally, a handful of commenters argue that the Commission should retain the spectrum cap to ensure that rural areas will enjoy the benefits of competition, *i.e.*, by preserving incentives for PCS carriers to operate in these underserved areas.[52/] These unsupported assertions pale in comparison to record evidence and economic analysis showing that the cap actually serves as a significant barrier to providing services in rural areas.

In its Comments (at 13-15), Western discussed its efforts to provide wireless services, including local loop and other "universal service," in rural areas, and identified several affirmative steps the Commission should take to promote expansion of such services. Eliminating the spectrum cap is one of those steps because it will enable incumbent and new carriers to take advantage of economies of scale and scope, and other market synergies. Accordingly, as recognized by CTIA, in some rural areas an incumbent cellular carrier may be the only CMRS provider willing or able

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[50/] Comments of Bell Atlantic, at 10-13; Comments of AT&T, at 8-9.

[51/] Comments of Sprint, at 14.

[52/] *See, e.g.*, Comments of MCI, at 4; Comments of D&E, at 5-6; Comments of TDS, at 3.

to provide digital PCS.[53/]

For similar reasons, several commenters familiar with the dynamics of the market for rural cellular and PCS advocate eliminating (or substantially increasing) the cap. Omnipoint, a PCS provider in multiple urban and rural markets, alerts the Commission to the increased difficulties small PCS carriers are facing obtaining necessary capital, concluding that "reasonable spectrum consolidation . . . remains a viable alternative to ensure that many licensed frequencies are supported by a physical network infrastructure."[54/] Omnipoint also argues, correctly, that "cordoning off rural markets, or any other segment of the market, will cause competitive partnering and offerings to be re-worked and re-configured, only to meet the demands of the FCC spectrum cap limits."[55/] RTG shows that the cap bars rural cellular incumbents, who are arguably the best suited to bring digital wireless services to many rural areas, from providing PCS service in adjacent areas or from entering into joint ventures or strategic alliances with large PCS (unless the former commit to providing service to an area ten times greater than any overlap area).[56/] Likewise, Radiofone advocates eliminating or modifying the spectrum cap prior to the upcoming re-auctions, to encourage cellular incumbents to enter into strategic relationships with C-Block licensees in their markets in order to "help speed the delivery of advanced telecommunications services to the public."[57/]

53/ Comments of CTIA, at 12.

54/ Comments of Omnipoint Communications, Inc. ("Omnipoint"), at 4. *See also*, Comments of AT&T, at 11-12 (the spectrum cap chills joint ventures and investment in new wireless companies).

55/ Comments of Omnipoint, at 6.

56/ Comments of RTG, at 9.

57/ Comments of Radiofone, at 7.

Ultimately, buildout of PCS systems in rural areas will only be accomplished "in response to perceived demand for services and the cost to supply such services . . . . [i]f the Commission does not interfere with a carrier's ability to achieve service at lower costs, then carriers have greater ability to . . . make services more widely available."[58/] In the NPRM (at ¶46), the Commission acknowledges that the economics of providing service to low density areas may deter deployment of PCS. The spectrum cap amplifies this problem by preventing carriers from reducing costs, thereby inhibiting introduction of competitive CMRS services in rural areas. The cap is therefore an affirmative bar to realizing an important Commission objective; it should be abolished.

IV. THE SPECTRUM CAP IS OVERLY INCLUSIVE AND RESTRICTS GROWTH OF WIRELESS SERVICES

The foregoing shows that the spectrum cap has been supplanted by market forces and, therefore, is no longer necessary to ensure the continued growth of competitive CMRS services. There is, however, another compelling reason why the cap should be eliminated or no longer enforced: as applied, the cap is arbitrary and over inclusive, and therefore has clearly identifiable restrictive effects unrelated to any pro-competitive objectives. First, the cap works to bar transactions that, under any economic analysis, cannot have anti-competitive effects. Second, the cap is based upon an unreasonably narrow market definition which, over time, will undermine the ability of CMRS carriers to compete effectively with wireline and other carriers.

58/ Comments of CTIA, at 11.

A. The Cap Blocks Transactions Raising No Anti-Competitive Concerns

In the NPRM (at ¶5), the Commission states that regulations should only be imposed "when there is an identifiable market failure." Although Western believes that the mobile two-way voice market is healthy and competitive as a whole, it is particularly concerned with application of the spectrum cap to transactions that, under any reasonable analysis, have no competitive effects.

In its Comments, AT&T Wireless Services, Inc. ("AT&T") demonstrates that numerous transactions raising no competitive concerns are effectively barred by the spectrum cap. First, the cap precludes carriers from acquiring or holding spectrum in excess of 45 MHz in markets where real-world data and/or theoretical economic indicators (*e.g.*, the HHI) show that competition is indisputably robust.[59/] Although the spectrum cap was designed to approximate the 1992 Merger Guidelines,[60/] AT&T shows that the spectrum cap bars transactions that would not raise concerns under the 1992 Merger Guidelines.[61/] Second, the cap bars transactions where the pro-competitive effects of a proposed transaction outweigh the anti-competitive effects,[62/] and does not allow parties the flexibility to demonstrate that such transactions are, on balance, pro-competitive.[63/]

The Commission has specific evidence in this proceeding regarding the cap's impact on

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59/ Comments of AT&T, at 6 and Exhibit 1 (Statement of Economists Incorporated (at 9-11)).

60/ *Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines*, *reprinted at* 4 Trade Reg. Rep. (CCH) ¶13,104 (1992).

61/ Comments of AT&T, at 6.

62/ *Id.* at 6 and Exhibit 1 (at 11-21).

63/ The Commission has entertained requests for waiver of the spectrum cap, however, it has not yet granted any such waivers and has delayed consideration of several requests. Western filed its request for waiver with respect to the Denver, CO MTA on July 11, 1997; to date, the Commission has not yet acted on this request.

transactions raising no anti-competitive issues. In its comments, Western discussed two markets--Denver, CO and Oklahoma City, OK-- where it currently holds spectrum in excess of the cap and is prosecuting waivers of the spectrum cap.[64/] In the Denver MTA, the overlap between Western's PCS license and rural cellular licenses is approximately 13.6% of the MTA; the HHI of the MTA is 1627, well below the 1900 level deemed presumptively competitive by the Commission; and Western competes with no less than six wide-area cellular, PCS and SMR carriers. Western's holding of these overlapping interests have had no anti-competitive effects, and have actually facilitated expansion of service into BTAs presently unserved by any other PCS or SMR carrier.[65/] In Oklahoma City, the overlap between Western's MTA, BTA and cellular licenses is 11.63% of the MTA; the HHI of the MTA is 1563; and Western competes with five wide-area cellular, PCS and SMR carriers.[66/] In each of these markets, prices have dropped steadily and service options have increased since Western commenced operations. Yet, in each of these markets, Western will be forced to divest cellular or PCS spectrum absent grant of waiver and, in the interim, is faced with uncertainty regarding the status of its CMRS licenses.

64/ The Commission indicated in the NPRM that it will address Western's waiver proceedings separately from the instant rulemaking proceeding, however, the facts in those proceedings clearly implicate the issues raised in the NPRM.

65/ Western met its ten-year coverage benchmark at the time its waiver request was filed, and currently covers over 80 percent of the MTA population; its coverage area far exceeds that of its two current PCS competitors, Sprint and U.S. West, and it is currently the only PCS carrier providing service to the Cheyenne, WY and Pueblo, CO BTAs. Moreover, Western's pricing has been consistently lower than any of its competitors in Denver. Comments of Western, at 6-7.

66/ Western's Oklahoma City PCS network covers between 59% and 60% of the MTA population. Western provides service to all or substantially all of the population in three BTAs within the MTA for which it holds licenses, whereas its PCS competitors serve only minor portions of these BTAs and provide far less coverage than Western elsewhere in the MTA. Comments of Western, at 7-8.

The record in this proceeding demonstrates that similar factual situations are being encountered by other carriers. Triton Cellular Partners, L.L.C. ("Triton") is currently prosecuting a request for waiver of the spectrum cap due to one of its owners' holdings in Telecorp PCS, Inc., ("Telecorp"), a PCS licensee whose service areas overlap Triton's by 12 percent.[67] Although Triton and Telecorp are otherwise unrelated, the spectrum cap rule operates to bar use of a common investor as funding source, thereby placing a cloud on Triton's and Telecorp's licenses and, on a broader scale, creating a chilling effect with respect to capital investment in cellular and PCS.[68] Similarly, the cap operates to prohibit affiliation agreements between large PCS and SMR carriers and small, rural wireless carriers (including rural local exchange carriers), unless the latter possess the resources to build out areas with populations ten times greater than the targeted service area(s).[69] With respect to such affiliation arrangements, the cap operates to prevent expansion of mobile voice services into rural areas. In sum, by blocking transactions and creating uncertainty where no anti-competitive effects exist, the spectrum cap actually limits carriers' ability to expand services and/or obtain financing, thereby limiting their ability to compete. The cap is thus overinclusive and harmful to competition.

B. The Cap Is an Obstacle to Expanded Wireless Service Offerings and Inter-Service Competition

Although the CMRS industry has experienced immense growth in recent years, the potential for wireless services is virtually boundless. New applications for existing technologies are being

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[67] *See* Comments of Chase Capital Partners ("CCP"), at 2; Comments of Triton, at 2-3.

[68] Comments of CCP, at 5-6; 8-10. *See also,* Comments of Sonera Ltd. (at 2-3) (minority investor in a Block C PCS licensee barred from holding minority interests in other broadband licensees).

[69] Comments of RTC, at 5-6.

announced almost daily, and wireless carriers are increasingly seen as viable providers of, *inter alia*, local exchange service (including universal service in rural and high cost areas);[70] internet access, including wireless e-mail; and broadband services, including high-speed video and data services.[71] Indeed, the U.S. Department of Commerce projects that wireless data traffic will far outstrip voice traffic within the next few years;[72] firms currently providing exclusively voice services will increasingly seek to expand to compete in the data provision market. Further, the next generation of advanced wireless services, IMT-2000 or third-generation ("3G") services, are currently being developed and are expected to be brought to the market within the next two to three years.[73] At the same time, two-way voice services are subject to increased competition from other sectors of the communications industry including, *inter alia*, 220 MHz SMR, dispatch, one-way and two-way data, fixed services including wireless local loop, mobile satellite service (which enjoys an expansive bandwidth allocation), Local Multipoint Distribution Service, millimeter wave radio services in the 18 and 39 GHz bands, two-way IMTS (improved mobile telephone service) and, perhaps, interactive video and data service ("IVDS").[74]

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[70] Indeed, as noted in its Comments (at 9-10), Western has already committed to providing wireless local loop in competition with local exchange carriers, and is seeking state certification to provide universal services.

[71] *See, e.g.,* NPRM at ¶43; *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report to Congress (released February 2, 1999) ("*Section 706 Report*"), at ¶¶12, 49.

[72] *U.S. Industry & Trade Outlook*, at 30-15.

[73] *Commission Staff Seek Comment on Spectrum Issues Relating to third Generation Wireless/IMT-2000*, Public Notice, DA 98-1703 (released August 26, 1998).

[74] *See* Comments of Western, at 12; *Third Competition Report*, at 628 (discussing convergence (continued...)

Thus, while Western's primary competitors to date have been cellular, broadband PCS and SMR carriers, it is becoming increasingly clear that applying a spectrum cap to the "two-way mobile voice market" is unduly restrictive. As technology improves and telecommunications services continue to converge, such limited market definitions are rapidly becoming obsolete.[75/]

Of the trends discussed above, the Commission has on multiple occasions cited the potential for wireless carriers to provide competition to LECs as particularly important.[76/] Moreover, competition to LECs was Congress' paramount objective in passing the Telecommunications Act of 1996 (the "1996 Act"), and wireless may be best means to achieve such competition, particularly in rural areas, due to lower infrastructure costs and flexible service offerings. In devising eligibility rules for LMDS, the Commission limited eligibility for incumbent LECs, but refused to impose any conditions or apply the CMRS spectrum cap to CMRS carriers, notwithstanding the tremendous bandwidth capacity associated with LMDS licenses.[77/] The Commission explained its action as designed to spur CMRS incumbents to compete with incumbent LECS.[78/] The same rationale applies here: the Commission should allow flexible use of spectrum to promote increased wireline-

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[74/] (...continued)
of products and services); *U.S. Industry & Trade Outlook*, at 30-12.

[75/] *Section 706 Report*, at ¶35, note 46.

[76/] *See, e.g.*, NPRM, at ¶46; Address of Chairman William E. Kennard before the Wireless Communications Association International, July 10, 1998 ("in my vision of the broadband future, not only can wireless services compete, they must compete . . . if advanced telecommunications services are to become available quickly, and at reasonable cost . . .").

[77/] *In the Matter of Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band*, 12 FCC Rcd 12545 (1997); *aff'd*, Melcher v. FCC, 134 F.3d 1143 (D.C. Cir. 1998).

[78/] *Id.* at ¶183. The Commission did impose eligibility restrictions on incumbent wireline local exchange carriers for LMDS spectrum, however.

wireless competition.

Viewed in this light, rules such as the spectrum cap which artificially restrict the capabilities of wireless carriers to develop new products and services, or to compete effectively with other established services, must be removed absent compelling reasons for retention.[79] Retaining the spectrum cap will undermine the ability of wireless services to participate in transforming the communications landscape. Such a result will run counter to the Commission's goals in the NPRM and, more important, Congressional intent in passing the Telecommunications Act of 1996.

V. CONCLUSION

For the foregoing reasons, the Commission should eliminate or forbear from enforcing the CMRS spectrum cap as set forth herein.

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[79] Comments of GTE, at 20-22 (the spectrum cap will preclude affected carriers from providing 3G services due to spectrum constraints).

CERTIFICATE OF SERVICE

I, Lilly A. Whitney, a secretary in the law offices of Gurman, Blask and Freedman, Chartered, do hereby certify that I have had, on this 10th day of February, 1999, copies of the foregoing "REPLY COMMENTS OF WESTERN WIRELESS CORPORATION" mailed by U.S. first class mail, postage prepaid, to the following:

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